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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~72-65~~ 72-95

LEWIS S. TOLLETT, Warden
Tennessee State Prison for Men
Nashville, Tennessee,
Petitioner,

vs.

WILLIE LEE HENDERSON,
Respondent.

Brief of the People of the State of California Amicus Curiae in Support of Petitioner

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Interests of Amicus Curiae

The issue presented in this case, set forth by the State of Tennessee in its petition for writ of certiorari is as follows:

> "Did Mr. Henderson [a black defendant] waive his rights to attack the racial composition of the grand jury which indicted him by his failure and the failure of his retained counsel to object to the composition of the grand jury prior to entering a plea to the indictment."

California law, similar to that of Tennessee, requires that a challenge to the grand jury (or to the trial jury panel)

must be made before trial. *See, People v. Sirhan*, 7 Cal.3d 710, 751, 755 (1972).

We are interested in this case because resolution of the question of what constitutes deliberate by-pass sufficient to preclude consideration of an issue on federal habeas corpus will have a significant impact on the volume of litigation in the federal courts, on the states' vital interest in their valid procedural rules, and on their equally vital interest in the finality of criminal convictions following fair trials or voluntary pleas of guilty.[1] We are convinced that all of these interests will be served, and no valid interest of a state prisoner compromised, by a decision of this Court which defines deliberate by-pass to include failure to follow such valid state procedural rules for raising constitutional questions, without further inquiry into the motivation of competent counsel or the personal knowledge and waiver of the defendant.

SUMMARY OF ARGUMENT

The decision below is erroneous because it applied the "classic" test of waiver set forth by this Court in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938): "an intentional relinquishment or abandonment of a known right or privilege." Despite the fact that failure to challenge a grand jury indictment has no relation to the voluntariness or validity of the subsequent proceedings, in this case a guilty plea, or the competence of counsel's advice, the court below refused to establish a "hierarchy" of constitutional rights and limit the applicability of the classic definition of waiver. The court also refused to apply the reasoning of this Court's decision in *Henry v. Mississippi*, 379 U.S. 443, 451

1. For an example of the problems raised, see *Carmical v. Craven*, 457 F.2d 582 (9th Cir. 1972), *cert. denied* October 12, 1972, No. 71-1602.

(1965), where the conduct of counsel was held insufficient to waive a constitutional right, because it deemed counsel's actions herein not a deliberate choice of tactics. The court, in our view, overlooked the clear facts of the case—which were not that counsel was unaware of the right involved but that no lawyer in the state would have thought of objecting. Moreover, the court gave no recognition or consideration at all to the state's compelling interest in the finality of criminal convictions and the near impossibility of a fair inquiry into the motivation of competent counsel years after the event. Finally, the court gave little recognition to this Court's decision in *McMann v. Richardson*, 397 U.S. 759 (1970), which appears to be controlling here, and persuasive authority for the general proposition that where competent counsel may waive the constitutional right in issue as a matter of tactics, inquiry into his motivation should simply not be undertaken.

ARGUMENT

Failure by Competent Counsel to Make the Challenge to the Grand Jury at the Proper Time in Accordance With Valid State Procedural Rules Should Be Deemed a Deliberate By-Pass Precluding Federal Relief Without Further Inquiry Into the Motivation of Counsel of the Knowledge of the Defendant.

In *Johnson v. Zerbst, supra*, and *Fay v. Noia*, 372 U.S. 391 (1963), this Court established the basic principle that the waiver of a constitutional right must be personal, knowing and intelligent in order to preclude review on federal habeas corpus. In *Fay v. Noia*, this Court distinguished between the independent state ground sufficient to preclude appellate review of state court decisions, and the deliberate by-pass or waiver sufficient to preclude review on federal habeas corpus. This Court did indicate, however, that failure to follow state procedural rules could constitute delib-

erate by-pass, implying that waiver by counsel might be sufficient in some cases. *Id.* at 424-425, 433, 430-439.

Subsequently in *Henry v. Mississippi*, 379 U.S. 443 (1965), this Court made it clear that a deliberate choice of trial tactics by counsel in failing to follow a valid state procedure (raising an objection to evidence) would preclude federal review, either direct or on habeas corpus. Although this Court found evidence in the case which suggested reasons for counsel's move, the case was sent back for a hearing on counsel's reasons.

Very recently, this Court has suggested that some choices by counsel would be considered deliberate by-pass without inquiry into motivation absent some extraordinary circumstances. In *McMann v. Richardson*, 397 U.S. 759, 768-769 (1970), this Court held that a counseled defendant was not entitled to a hearing on his allegation that his plea of guilty was motivated by a coerced confession. This Court considered his plea a "plain by-pass" of state remedies in regard to testing the confession and commented that whether it was intelligent depended on whether he was so incompetently represented by counsel he should be afforded another chance.

We submit that these cases establish that there are and should be different standards of determining whether state procedures have been deliberately by-passed, depending on the right involved, the procedural rule involved, the effect of the rule on the fairness of the proceedings, and whether or not the defendant was competently counseled. The decision below was erroneous because it gave no consideration to these factors and rigidly applied the *Johnson v. Zerbst* standard of waiver in an inappropriate situation.

In the case presently before this Court, a black defendant was indicted in 1948 for first degree murder by a grand jury from which, it was subsequently concluded, blacks had been systematically excluded. The defendant had confessed

to the crime charged. The defendant was represented by competent retained counsel and pursuant to a plea bargain entered a plea of guilty and was sentenced to 99 years in prison. The issue of systematic exclusion of blacks from the grand jury was not raised until 1967, when the defendant sought habeas corpus relief on that ground in the state courts. While the state trial court found no systematic exclusion, the appellate court denied relief on grounds the issue was waived by failing to raise it before pleading to the indictment. On habeas corpus in the federal courts, the district court found systematic exclusion and held that the right to challenge the indictment had not been waived.

The Court of Appeal affirmed. Although the Court of Appeal recognized that failure to challenge at the appropriate time waived the issue under Tennessee law, and properly applied federal law in determining whether the right had been waived, the standard it applied was the "classic" definition of waiver set forth in *Johnson v. Zerbst*, and *Fay v. Noia*: "Did the defendant's conduct amount to an intentional relinquishment or abandonment of a known right or privilege." The court rejected the state's suggestion that applying the "classic" standard was inappropriate because nothing in *Fay v. Noia* suggested that this Court meant to establish a "hierarchy" of constitutional rights and apply different standards to them.

The court also rejected the *Henry v. Mississippi* waiver by counsel because petitioner's counsel testified he never thought of the possibility of challenging the grand jury, and the concurring appellate judge commented that no lawyer in Tennessee would have thought of challenging the grand jury.

Finally, the court disposed of *McMann v. Richardson* by a casual reference in a footnote that flexibility in inquiry was not foreclosed. The "flexibility" utilized by the court

was to set aside the presumption that a voluntary guilty plea entered upon advice of competent counsel implies a knowing abandonment of rights where "evidence" suggests that the presumption is unreliable. The court found unreliability because of its own doubt that a Negro defendant in 1948 would know of the right to challenge the jury and because of the suggestion of the appellate judge that members of the bar would have been equally unaware of the right.

First, on facts alone the court's decision is erroneous. The suggestion was that no lawyer would have thought of doing so, not that lawyers were *unaware* of the right. More important, however, is the fact that the inquiry was made at all. *McMann* strongly suggests, if it does not hold, that there will be no further inquiry into motivation where a voluntary guilty plea is made by a defendant represented by competent counsel.

While we consider *McMann* completely disposes of this case because a plea of guilty was entered, we think the doctrine of deliberate by-pass should control whether the defendant pleads or goes to trial. On considerations outlined above, logic and common sense dictate that there should indeed be a "hierarchy" of rights requiring different standards of waiver. We submit that failure to object at the appropriate time to the composition of the grand jury or, in close analogy, to the jury panel should preclude relief without further inquiry into the knowledge or motivation of either the defendant or his counsel unless there is some tenable claim of incompetence.

The use of a knowing and intelligent waiver standard cannot logically or even usefully be extended to all trial decisions which involve constitutional rights; both the burden on the courts and the potential for disrupting the administration of justice are too great. The confrontation

of witnesses and the right to call witnesses are important constitutional rights. Counsel's decision in these matters must prevail, whether the defendant agrees or not, if the "right" to counsel is to have any content other than a lawyer standing by to obey his client's whims and suggestions, sound or not. Whether or not to object to the admission of evidence is a trial decision which should be made by counsel, and unless he is incompetent, his decision right or wrong should be binding on his client.

In a different class entirely are those basic rights accorded an accused which, by their nature can be given up or waived only by affirmative action. The right to be represented by counsel, the right to a jury trial and the right not to testify against himself are such rights. And even in the latter, an accused represented by competent counsel must be presumed to waive the right merely by the affirmative act of testifying.

If any criminal conviction is ever to become final, there are some rights which must be deemed waived by failure to exercise them, depending on the nature of the right at issue and the compelling state interest in the procedural rule involved. A right to challenge the grand jury is an important constitutional right, but affirmative action is required to exercise it.[2] In the normal course of an indictment and trial no action whatever is required if the decision of counsel is to proceed without making the challenge. There are, of course, two aspects to this right, one is the right of the defendant not to have his race purposely excluded from the grand jury which indicts him. The other is the right of the excluded group to serve. The latter interest is protected by the right of the excluded group to challenge the exclusion by independent action. The right

2. Similar considerations apply to the requirement for challenging the jury panel before the jury is sworn.

of the defendant is amply protected by requiring the challenge to be made before trial. Once he is convicted by a properly constituted jury or enters a plea of guilty, permitting a belated attack on the composition of the grand jury is an exercise in futility. Requiring counsel in a collateral attack long after the event to justify his failure to make the challenge invites either challenges counsel considers useless because serving only the cause of delay, or the dubious tactic of failing to make the challenge the first time to give his client the benefit of a second trial. We think it reasonable to presume that any competent lawyer is *aware* of the right to challenge grand juries or petit jury panels on the grounds of racial exclusion. We submit that counsel's reasons for not making the challenge should not be subject to later inquiry in the absence of a tenable claim of incompetency.

We point out that the constitutional right in question, while important does not go to the fairness of the trial or the voluntariness of a guilty plea. Permitting an untimely challenge subverts the obvious interest of the state in resolving such issues before trial and their compelling interest in the finality of convictions which were obtained in completely fair proceedings with the defendant protected by competent counsel.

While the Court has not addressed itself to this question since *Fay v. Noia, supra,* earlier cases both explicitly and implicitly required a timely challenge before the issue would be considered. In *United States v. Gale,* 109 U.S. 65 (1883), the defendants challenged the statute disqualifying as grand jurors those who voluntarily took part in the rebellion. The Court did not reach the question,[8] because it held that by pleading not guilty and going to trial without

8. The court implied, however, that the statute was unconstitutional because it would exclude most whites.

objection, such objection was waived. *See also, Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Carter v. Texas*, 177 U.S. 442 (1900). *Cf., Frazier v. United States*, 335 U.S. 497, 512-514 (1948) (challenge to trial jurors); *Fay v. New York*, 332 U.S. 261 (1947) (challenge to jury panel). In *Fay* this Court noted that if the challenge was good, all convictions by special juries "would be set aside *if the question had been properly raised at or before trial.*" *Id.*, at 266 (emphasis added). We submit that these cases should be followed, and that consideration of the right involved here requires a different standard of waiver than the "classic" standard of *Johnson v. Zerbst.*

CONCLUSION

Because of the compelling interests of the states in their valid procedural rules and the finality of their fair criminal convictions, and because no valid interest of the accused is served by subverting them, we respectfully submit that the judgment below was erroneous. This Court should hold that failure to raise the issue at the appropriate time with full opportunity to do so constitutes deliberate by-pass which preclude relief on federal habeas corpus without further inquiry into the motivation of counsel.

Dated: November 29, 1972

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